No. 92-1964

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

NATIONAL LABOR RELATIONS BOARD
Petitioner,

v.

HEALTH CARE & RETIREMENT CORPORATION OF AMERICA,
Respondent.

BRIEF OF *AMICUS CURIAE* COUNCIL ON LABOR LAW EQUALITY IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

The Council on Labor Law Equality ("COLLE") is a voluntary national association of large and small employers formed to monitor the activities of the National Labor Relations Board, related developments under the National Labor Relations Act, and to provide support to employer interests on those issues which affect a broad section of industry. COLLE's formation recognizes the need for a specialized and continuing business community effort to provide assistance in the review of NLRB and court decisions in order to maintain a balanced approach in the formation and interpretation of national labor policy.

In the instant case, the National Labor Relations Board entered an order fundamentally altering management's expectation that it shall retain the loyalty of its supervisory personnel. The expectation extends to preserving and protecting employer property and business interests and ensuring its right to do business without direct interference.

The manner in which the legal issues under review are resolved by the Court is extremely important to employers throughout the

nation. The Board's decision calls into question one of the principle features of the National Labor Relations Act ("NLRA") that is designed to protect management's right to direct its business. However, the Board's foray into the health care field, emasculates this statutory interest and sweeps aside years of caselaw decisions articulating the importance of employer interests.

For these reasons, it is within the interest of employers to assure that the Board's remedial authority is confined to its appropriate sphere and invoked under procedural strictures sufficient to permit informed judicial review. Moreover, it has become painfully clear that it is too expensive for employer's to repeatedly challenge Board findings in the appellate courts when the deference given to the Board is so high.

The parties have thus far primarily focused on issues involving judicial review of administrative decisions and the power of the Board to amend its interpretation of the statute. However, COLLE believes that the issue presented in this case includes not only whether the Board's analysis is the correct test, but whether as applied, is manifestly inconsistent with the Act.

COLLE thus brings to this case a diverse perspective not presently represented. Therefore, COLLE's participation may assist the Court in obtaining full consideration of the public-interest issues.

ISSUE PRESENTED

Whether the statutory definition of a supervisor in Section 2(11) of the National Labor Relations Act permits the Board to qualify the definition in any respect.

STATEMENT OF THE CASE

Respondent Health Care & Retirement Corporation of America owns a 100 bed nursing home located in Urbana, Ohio. The home employs approximately 100 persons and is managed by a staff composed of a Director of Nursing, an Assistant Director of Nursing,

thirteen to fifteen LPN's, and fifty-five aides. If nurses are not counted as supervisors, the supervisor-employee ratio would be 30:1. If counted, the ratio is 4:1. 47a.

In the spring of 1989, three nurses believed that the facility was being run ineffectively and sought to air this matter with the nursing home administrator. When informed to schedule an appointment, these nurses instead chose to drive to the corporate headquarters the next day to meet with the corporate Director of Human Resources.

After an investigation, management chose to implement a program to meet the nurses's grievances and also requested the support of the nursing staff. During the investigation, several items concerning the three nurses came to the attention of the Respondent. These matters included improper documentation of medical records as well as unexcused absences. As a result of these and other problems, the three nurses were asked to resign or be fired. 16a.

The Board found the nurses to be employees and entitled to protected concerted activity under the Act. 13a. The court of appeals disagreed. It determined that the statutory tests found in Section 2(11) of the Act, 29 U.S.C. § 152(11), applied in the disjunctive, 7a, so that if a nurse met any of the tests for a supervisor, then the employer could expect their "undistracted loyalty." 6a.

The court of appeals found that these nurses did not meet the statutory test because the staff nurses at the very least had the authority to assign aides and to direct them. 9A. Therefore, the court found that the Board's Order did not comport with the Act.

SUMMARY OF ARGUMENT

The Congress established two essential requirements in the National Labor Relations Act as it applies to the health care field. First, that management must expect that it would continue to act through its selected representatives and supervisors. To ensure their loyalty, these persons were not provided the protection of the Act. Secondly, the Congress established a statutory test that identifies supervisors as "any individual" who could exercise any of the

following acts: "to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, **or** discipline other employees." 29 U.S.C. § 152(11) (emphasis added).

The statutory language plainly reads in the disjunctive. The legislative history also establishes that the Congress expected the Board to determine what persons are "supervisors" under the caselaw established by the Board as of 1974. However, the Board has chosen to proceed beyond the language of the statute and its legislative history. It has chosen to apply in the health care field a test not found elsewhere in the statute, whether the health care person is performing serves primarily for a patient rather than the employer. That test finds no support in the statute or legislative history. Consequently, the Board's mechanism to ascertain who is a "supervisor" under the Act is contrary to the Act and should not be sustained.

ARGUMENT

THE COURT MUST APPLY THE STATUTORY RULE THAT THE BOARD MUST FOLLOW THE STATUTORY LANGUAGE OF THE ACT

The Board has determined that when a principal function of the nurse and the aides who report to them is the provision of *patient* care, then the nurses are not supervisors. As applied by the Board, this extra-statutory standard constitutes nothing less than an "amendment" of the Act for health care employers, and is well beyond the standards previously stated by this Court.

A. THE BOARD'S DECISION DOES NOT SATISFY LEGAL REQUIREMENTS REGARDING SUFFICIENCY OF EVIDENCE IN SUPERVISORY STATUS DETERMINATIONS.

This case comes before the Court with the understanding that if it is unable to:

> conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view, we may deny enforcement.

Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).

In essence, the Board's Decision and Order manages to bypass virtually every aspect of supervisory authority through the expedient application of the term "patient care." This "analysis" has the unavoidable effect of "amending" Section 2(11) of the Act[1] to create a different legal standard for determining supervisory status in health care institutions – something that *Congress expressly* refused to do when it considered the issue in the debates that culminated in the 1974 Health Care Amendments to the Act. It is axiomatic that the Board majority should not be permitted to do that which Congress, having been afforded the opportunity, specifically refused to do.

1. The Board has Created a New Standard for Supervisory Status in the Health Care Industry.

The current form of the Board's "patient care" rationale had its genesis in *Beverly Manor Convalescent Ctrs.*, 275 N.L.R.B. 943

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[1]Section 2(11) of the Act, 29 U.S.C. § 152 (11), provides that:

> [t]he term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgement.

(1985) *("Beverly Manor")*, *remanded from* 727 F.2d 591 (6th Cir. 1984).[2] There, the Board reasoned as follows:

> [I]f it is found that some authority exists which in other contexts would be found to bestow supervisory status, the qualitative nature of this authority *must be subjected to a second-step analysis in order to determine the ends for which it is exercised.* Thus, acts which would ordinarily be supervisory may, in the health care context, indicate no more than, the exercise of technical or professional judgment.

Beverly Manor, 275 N.L.R.B. at 946 (emphasis added).

The *Beverly Manor* Board found support for this extra-statutory gloss in the legislative history of the 1974 Amendments to the Act. "[T]he Senate indicated that a health care professional does not exercise authority in the interest of an employer when that individual's 'direction' to other employees is the 'exercise of professional judgment' incidental to the professional's treatment of patients." 275 N.L.R.B. at 946, *citing Sutter Community Hospital of Sacramento, Inc.*, 227 N.L.R.B. 181, 192, *citing* S. Rep. No. 93-766, 93d Cong., 2d Sess. 6 (April 2, 1974).

Beverly Manor suggests that, as a "dictate of congressional intent," findings of supervisory status in health care institutions must be supported by "additional personnel authority which more directly promotes the interests of the employer and which is not motivated by patient *care needs*." 275 N.L.R.B. at 946-47 (emphasis added). It is, says the *Beverly Manor* Board, "[the] congressional intent that

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[2]The Board's Decision and the ALJ's opinion also cite various other Board cases which themselves rely on *Beverly Manor Convalescent Ctrs.*: *Waverly-Cedar Falls Health Care. Inc.*, 297 N.L.R.B. No. 40 (November 28, 1989); *Phelps Community Medical Ctr.*, 295 N.L.R.B. No. 55 (June 15, 1989); *The Ohio Masonic Home, Inc.*, 295 N.L.R.B. No. 44 (June 15, 1989); *Passavant Health Ctr.*, 284 N.L.R.B. 887, 889 (1987). The Board also cites to *Riverchase Care Ctr.*, 304 N.L.R.B. 861 (1991) at n.1. That decision was denied enforcement by the Fourth Circuit. F.2d (4th Cir. 1992) (unpublished opinion).

when direction of other employees is given *in connection with* treatment of patients that this is not the exercise of supervisory authority in the interest of the employer." 275 N.L.R.B. at 947 (emphasis added). The Board sums up this hypothesis, stating that it is "Congress' *mandate*, that any ostensible authority exercised by health care providers *must be* scrutinized to determine by what it is motivated...." If the putative supervisor's actions "grow out of professional or technical concerns for patient well being," they cannot, according to *Beverly Manor*, be supervisors. (emphasis added).

The Board both misreads the portion of the legislative history on which it relies and ignores other highly probative portions which the Board apparently considers inconveniently contrary to its "agenda."

2. Legislative History Conclusively Establishes that Congress Intended the Board to Continue to Apply the Same Statutory Analysis Used Prior to the 1974 Amendments.

As originally enacted, the Act contained no definition of "supervisor." 49 Stat. 449 (1935). Section 2(11) as it exists today, was introduced in the Taft-Hartley Amendments in 1947. 61 Stat. 136 (1947).

Congress pointed out at that time that a "lead person" or "straw boss" whose minimal "authority" derived from greater training, skill or experience should not fall within the Act's definition of "supervisor." 2 Legislative History of the Management Relations Act of 1947, 1303 (1947); *cited in NLRB v. Pilot Freight Carriers*, 558 F.2d 205 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978). In 1974, Congress again amended the Act, extending its coverage to non-profit hospitals. 88 Stat. 395 (1974).

In the debates that culminated in the 1974 amendments (the "Health Care Amendments"), various interest groups urged Congress to amend Section 2(11) to exclude nurses and other health care professionals. One proposal, made by the American Nurses'

Association, was "to qualify [Section 2(11)] as it relates to professional registered nurse authority and responsibilities. A registered nurse should not be deemed a supervisor when exercising independent professional judgment." *Coverage of Nonprofit Hospitals Under The National Labor Relations Act 1972: Hearings on H.R. 11357 Before The Subcommittee on Labor and Public Welfare*, 92d Cong., 2d Sess. 19 (1372) (Statement of American Nurses Association) (emphasis added); *Extension Of NLRA To Nonprofit Hospital Employees: Hearings on H.R. 1236 Before The Subcommittee On Labor Of The House of Representatives Committee on Education And Labor*, 93d Cong., 1st Sess. 18 (1973) (Statement of the American Nurses' Association).

The Senate Committee, which reported out the bill which ultimately passed, responded:

> Various organizations representing health care professionals have urged an amendment to Section 2(11) of the Act so as to exclude such professionals from the definition of "supervisor." *The Committee has studied this definition* with particular reference to health care professionals ... *and concludes that the proposed amendment is unnecessary because of existing Board decisions*. The Committee notes that the Board has carefully avoided applying the definition of "supervisor" to a health care professional who gives direction to other employees in the exercise of professional judgment, which direction is incidental to the professionals treatment of patients, and thus is not the exercise of supervisory authority in the interest of the employer.
>
> The Committee expects the Board to continue evaluating the facts in this manner when making its determinations.

S. Rep. No. 766, 93d Cong., 2d Sess. 6 (1974) (emphasis added). Congress was thus satisfied that Board law in 1974 accurately reflected congressional intent (*i.e.*, did not deem "lead persons" or "straw bosses" whose authority arose solely from "greater training, skill, or experience," to be statutory supervisors). Congress specifically rejected efforts to amend the Act and it expressly directed the Board to continue to utilize the same principles it had always applied in considering supervisory status in the health care industry.

Several important points emerge from the foregoing legislative history. First, the above quoted portions of the 1974 Senate Report are the only express statements of congressional intent concerning the specific issue of supervisory status of health care professionals. There simply is no expressly articulated basis for the elaborate statements in *Beverly Manor* that purport to reflect "congressional intent."

Second, to the extent that congressional intent may be inferred from the Health Care Amendments, the inferences do not support the Board's construction of Section 2(11). Indeed, by axiom of statutory construction, the inference is unavoidable that Congress did not intend the Board to adopt as a rule of law a proposed amendment that Congress considered and specifically rejected. Yet, the Board has adopted as a rule of law virtually the precise definition of "supervisor" that the American Nursing Association proposed in 1974 and that Congress specifically rejected.

Third, the Board ignores completely the congressional direction that it continue to make supervisory status determinations in the health care industry in the same case by case manner that it had prior to 1974. The pre-1974 cases, discussed below, make it clear that the Board has misconstrued Section 2(11) and congressional intent, and that the Board majority herein has improperly found Respondent's nurse supervisors to be rank-and-file employees.

Thus, the Board drew no "reasonable distinction" when it crafted the patient service exception to the statutory definition of "supervisor." *Cf.* Pet. Br. at 16.

3. Under Pre-1974 Board Law Nurse Supervisors Are Unquestionably Statutory Supervisors.

As discussed below, the indicia of supervisory status possessed by Respondent's nurse supervisors, and discounted by the Board on

the basis that they are related to "patient care," would conclusively prove they are supervisors under the very pre-1974 Board decisions that Congress expected the Board to adhere to.

The pre-1974 Board decisions recognized that nurses' involvement in the disciplinary processes indicated supervisory status. *National Living Ctrs., Inc. d/b/a Autumn Leaf Lodge*, 193 N.L.R.B. 638, 639 (1971), *enf'd.*, 462 F.2d 575 (5th Cir. 1972) (nursing assistants were recommended for termination); *Rosewood. Inc.*, 185 N.L.R.B. 193, 194 (1970) (power to discipline nursing assistants). Other indicia of status includes the power to enforce policies of the Home through disciplinary measures. *Avon Convalescent Ctr., Inc.*, 200 N.L.R.B. 702, 706 (1972), *enf'd.*, 490 F.2d 1384 (6th Cir. 1974) (personnel policy empowered nurses to enforce rules and authorized nurses to "write up" nursing assistants for violations).

The ability to transfer nursing assistants to different jobs was also indicative of supervisory status. *Avon*, 200 N.L.R.B. at 706; *Autumn Leaf*, 193 N.L.R.B. at 639; *Doctors' Hospital*, 175 N.L.R.B. 354 (1969) (subsequent history). Another supervisory indicia was the authority to permit employees to leave early; *New Fairview Hall Convalescent Ctr.*, 206 N.L.R.B. 688, 749 (1973), *enf'd.*, 520 F.2d 1316 (2d Cir. 1975); *Rosewood*, 185 N.L.R.B. at 194; or to excuse lateness. *New Fairview*, 206 N.L.R.B. at 749. Nurses who adjusted schedules or assigned meal and break periods were also deemed supervisors. *New Fairview*, 206 N.L.R.B. at 749; *Avon*, 200 N.L.R.B. at 706. The power to adjust time cards was deemed a supervisory function. *New Fairview*, 206 N.L.R.B. at 749.

The Board held that the authority to call in employees to ensure staffing was indicative of supervisory status, *Garrard Convalescent Home, Inc.*, 199 N.L.R.B. 711, 717 (1972), *enf'd.*, 489 F.2d 736 (6th Cir. 1974); *Rockville Nursing Ctr.*, 193 N.L.R.B. 959, 962 (1971); as was the preparation of employee evaluations, *New Fairview*, 206 N.L.R.B. at 749; *Doctors' Hospital*, 175 N.L.R.B. at 354. Where nurses adjust employee grievances, *New Fairview*, 206 N.L.R.B. at 749, and where no other persons capable of exercising supervisory functions are present, they were deemed supervisors. *See NLRB v.*

Beacon Light Christian Nursing Home, 825 F.2d 1076 (6th Cir. 1987).

Higher pay than other employees was considered an indicia of supervisory status. *Doctors' Hospital*, 175 N.L.R.B. at 354. Where nurses were the highest ranking persons in the facility, the Board recognized them as supervisors. *Rockville*, 193 N.L.R.B. at 717; *Autumn Leaf*, 193 N.L.R.B. at 638-39. Nurses who attended in-service meetings concerning their supervisory duties were also considered supervisors under Section 2(11). *Avon*, 200 N.L.R.B. at 705.

Indeed, before 1974, the Board held that supervising the work of nurses aides in the administration of patient care services qualified an LPN as a supervisor under the Act. *University Nursing Home, Inc.*, 168 N.L.R.B. 263, 264 (1967). Assigning patient care duties to nursing assistants was also indicative of supervisory status. *Autumn Leaf*, 193 N.L.R.B. at 638-639. This finding was not inadvertent. Indeed, the Board specifically explained why such duties were supervisory:

> In a nursing home servicing elderly and sick patients whose critical needs may momentarily require variations in standard procedures, the nurse responsible for the supervision of other nurses or a shift or a section must obviously be prepared to exercise her discretion in utilizing her training and experience and assign and direct employees placed under her authority more than clerically or routinely.... Although the record does not establish that the nurses here in question hire, fire, or mete out discipline or directly recommend such action, their power to enforce major personnel policies and rules ... is compelling evidence that their direction and assignment of employees is substantial and meaningful...
> ...[E]ach of the ... nurses concerned was at all material times a supervisor, as defined in Section 2(11) of the Act because she had authority in the interest of the [employer] to "assign" and "responsibly to direct" other employees, as comprehended by that section.

Avon, 200 N.L.R.B. at 706.

In but one case prior to 1974 -- and indeed, three years before the above quote in *Avon* -- did the Board find that nurses were not supervisors because their duties were "solely a product of highly developed professional skills." In that case, the Board found that the nurses' authority was simply "to inform other, lesser skilled employees as to the work to be performed for patients" and was therefore analogous to the authority of the "lead person" or "straw boss" who, in the consideration of the Taft-Hartley amendments, Congress deemed non-supervisory. *Doctors' Hospital*, 175 N.L.R.B. at 354; *Doctors' Hospital of Modesto, Inc.*, 183 N.L.R.B. 950, 952 (1970) (same case).[3]

The overwhelming weight of pre-1974 Board law establishes that the N.L.R.B. evaluated supervisory cases in the health care industry according the traditional statutory indicia that it applied when making supervisory status determinations in any other industry. No pre-1974 case even suggests that the Board should apply any higher level of "scrutiny," or undertake any investigation of "motive" when making supervisory status determinations in the health care industry. Nor does any case even infer that activities "incidental to" or "in connection with" patient care should be outside the parameters of Section 2(11).

The Sixth Circuit found that the Board's rejection of the attributes of supervisory status identified in the statute was beyond its purview. It is not alone. As the Fourth Circuit has held, the statutory test for supervisory status is rampant with inconsistency in Board law:

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[3]In several other cases, the Board simply found that the assignment of duties by nurses were limited to the routine, established procedures, or dictated by routine patient needs, and thus not an expression of "independent judgment." *Leisure Hills Health Ctrs., Inc.*, 203 N.L.R.B. 326 (1973); *Madeira Nursing Ctr., Inc.*, 203 N.L.R.B. 323 (1973) overruled on other grounds, 217 N.L.R.B. 787 (1975); *Convalescent Ctr. of Honolulu*, 180 N.L.R.B. 461 (1969).

> So manifest has this inconsistency been, that a commentator ... aptly observed that "the Board has so inconsistently applied the statutory definition" of supervisor as to cause one to speculate "that the pattern of Board decisions ... displays an institutional or policy bias" ... as illustrated by a practice of adopting that "definition of supervisor that most widens the coverage of the Act, the definition that maximizes both the number of unfair labor practices findings it makes and the number of unions it certifies."

St. Mary's Home v. NLRB, 690 F.2d 1062, 1067 (4th Cir. 1982); *citing* Note, *The NLRB and Supervisory Status: An Explanation Of Inconsistent Results*, 94 Harv. L. Rev. 1713, 1714, 1721 (1981).

B. THE BOARD APPLIED AN INCORRECT STANDARD OF LAW IN FINDING THAT NURSE SUPERVISORS DO NOT EXERCISE AUTHORITY IN THE INTEREST OF THE EMPLOYER.

It is undisputed that the statutory criteria for determining whether individuals are "supervisors" — which are well known — are to be read in the disjunctive. *Waverly-Cedar Falls Health Care Ctr. v. NLRB*, 933 F.2d 626, 529 (8th Cir. 1991). Hence, the existence of even one of the statutory indicia suffices to establish supervisory status. *St. Mary's Home*, 690 F.2d at 1066; *Jeffrey Mfg. Div. v. NLRB*, 654 F.2d 944, 950 (4th Cir. 1981); *NLRB v. Tio Pepe. Inc.*, 629 F.2d 964, 969 (4th Cir. 1980); *Albany Medical Ctr.*, 273 N.L.R.B. 485, 486 (1985). It is also settled "that *possession* alone of the requisite authority is sufficient to establish supervisory status," *St. Mary's Home*, 690 F.2d at 1066; *Jeffrey Mfg. Div. v. NLRB*, 654 F.2d at 950; *NLRB v. Southern Seating Co.*, 468 F.2d 1345, 1347 (4th Cir. 1972).

Here, the record demonstrates that nurse supervisors possessed the requisite authority, and actually exercised it.

Specifically, the Board's decision turned principally upon its finding that the nurses' responsibilities primarily involve direct patient care. In that regard, the Board and the ALJ found that the

nurses': 1) assignment of work is routine and primarily concerned with patient care; 2) transfers of employees and grants of overtime are limited to considerations of patient care, id.; 3) adjusting of work schedules is only to repair conflicts which affect patient care, Id.; 4) authority in the disciplinary process does not extend beyond the realm of patient care; 5) participation in the resolution of grievances is motivated by patient care concerns; and, 6) participation in management meetings concerned discussions of responsibilities and skills required to ensure patient care. 13a, 36a.

C. THE BOARD'S DECISION IS COMPLETELY INCONSISTENT WITH THE RECORD FACTS AND THE LAW.

The Board's non-statutory "patient care" amendment to Section 2(11) permeates the majority's decision below. It was the "basis" upon which the majority discounted the Nurse supervisors' authority to discipline, direct, evaluate, assign, and to resolve employee grievances. Under traditional statutory criteria, and numerous Board decisions in which those criteria have been applied in a health care context, the Board's analysis is faulty.

Again, any analysis of supervisory status must begin with the fundamental precepts that 1) the statutory criteria must be read in the disjunctive; *St. Mary's Home*, 690 F.2d at 1065-66; *Jeffrey Mfg. Div.*, 654 F.2d at 950; and 2) *possession alone* of any statutory indicia is enough to establish supervisory status. NLRB v. Magnesium Casting Co., 427 F.2d 114 (1st Cir. 1970), *aff'd* 401 U.S. 137 (1970). Hence, a finding by this Court that Respondent's nurse supervisors *possess* any one of the statutory criteria – whether or not that authority is actually exercised – compels the conclusion that they are supervisors under the Act.

The presence or absence of other supervisors has long been a significant factor in supervisory status determinations. Here, if the nurse supervisors are not statutory supervisors, Respondent — a nursing home responsible for the total care of more than 100 aged and infirm residents — would be without a single on-site representative of management up to 76% of the time (40 out of 168 hours/week). 46a. This, of course, is a manifestly untenable

situation as even the ALJ noted, yet it is precisely the finding of the Board. This pattern of inconsistency has been recognized. *See Waverly-Cedar*, 933 F.2d at 631 (concurring opinion).

The Board found that during nights and weekends, the nurse supervisors are the highest ranking personnel in the Home. 46a. Yet, the Board cavalierly dismisses the clear import of the nurse supervisors' complete control of the facility as unpersuasive. The Board's failure to address this reasoning is baffling.

CONCLUSION

WHEREFORE, *amicus curiae* Council on Labor Law Equality respectfully requests that the Court affirm the decision of the Sixth Circuit.

Respectfully submitted,

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